Supreme Court, U.S.
FILED
MAY 22 1998
OFFICE OF THE CLERK

No. 97-1517

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MCCLATCHY NEWSPAPERS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEWSPAPER ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether an employer violates the duty to engage in collective bargaining under the National Labor Relations Act if, after the parties have negotiated to an impasse, the employer implements a proposal to increase wages based on individualized determinations of merit.

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STATEMENT OF INTEREST [1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community.

[1] Counsel for both parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members or their counsel, made a monetary contribution to this brief's preparation or submission.

The Chamber has participated as *amicus curiae* in several hundred cases before the Court.

The Newspaper Association of America ("NAA") is the largest trade organization in the newspaper industry. Its members include more than 1,600 newspapers in the United States and Canada and represent 87 percent of the daily newspaper circulation in the United States. Petitioner McClatchy Newspapers, Inc. is a member of the NAA.

Many of *amici*'s member companies are subject to the National Labor Relations Act, and thus have a vital interest in promoting its sound interpretation. Accordingly, the Chamber has filed *amicus* briefs in several NLRA cases, including *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); and *H.K. Porter & Co. v. NLRB*, 397 U.S. 99 (1970). Likewise, NAA and its predecessor organizations have filed *amicus* briefs in NLRA cases such as *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060 (1st Cir. 1995); *Passaic Daily News v. NLRB*, 736 F.2d 1543 (D.C. Cir. 1984); and *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615 (6th Cir. 1982).

Amici have grave concerns about the D.C. Circuit's holding that employers may not implement discretionary merit pay proposals at impasse. As explained below, that holding creates a circuit split, rejects settled principles that facilitate collective bargaining, and deprives employers of important rights protected by the NLRA. *Amici* offer the Court their important perspective on the crucial question presented.

STATEMENT OF THE CASE

This case presents a fundamental question about the implementation-at-impasse doctrine that is implicit in, and gives shape to, the duty to engage in collective bargaining

under the National Labor Relations Act ("NLRA"). The NLRA specifically states that the duty to engage in collective bargaining "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Applying that provision, the Court repeatedly has held that an employer does not violate the NLRA when, after negotiating in good faith to impasse, the employer implements a prior proposal on wages or other mandatory subjects of bargaining. *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231, 238-39 (1996); *Laborers Health Fund & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988).

In this case, the D.C. Circuit acknowledged the general rule permitting employers to implement at impasse, but created an exception for wage proposals that would allow employers to make individualized determinations of merit. The D.C. Circuit's decision conflicts with the Tenth Circuit's decision in *Colorado-Ute Electric Association v. NLRB*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992). As Chief Judge Edwards recognized, the question addressed in these cases "reach[es] to the heart of labor law" (Pet. App. 75a) and "implicates fundamental issues" in that field (Pet. App. 81a). And as Judge Silberman candidly acknowledged, the judges below viewed this case as "difficult" and were "obliged to admit that we are unsure ourselves as to the right answer." Pet. App. 24a.

1. During collective bargaining with a union, petitioner McClatchy Newspapers, Inc. proposed to increase employee wages through individualized determination of merit. The union, however, sought to eliminate any consideration of merit. After the parties bargained in good faith to impasse, petitioner implemented its proposed merit pay plan. Pet. 3-5.

Respondent, the National Labor Relations Board ("NLRB"), charged petitioner with refusing to engage in collective bargaining, in violation of sections 8(a)(5) and (a)(1) of the NLRA, 29 U.S.C. §§ 158(a)(5) &

(a)(1).[2] Relying on its subsequently discredited decision in *Colorado-Ute*, 295 N.L.R.B. 607 (1989), *enforcement denied*, 939 F.2d 1392 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992), the NLRB concluded that an employer violates its obligation to engage in collective bargaining when it unilaterally implements a discretionary wage proposal after impasse. Pet. App. 142a. The NLRB reasoned that any such implementation would require a voluntary "waiver" of the union's "statutory right to be consulted" about wages. Pet. App. 141a.

2. In three separate opinions, a D.C. Circuit panel unanimously refused to enforce the NLRB's decision. Judge Edwards recognized that the NLRB's "waiver" theory was "badly misguided" and "wholly unconvincing." Pet. App. 76a.[3] Despite "real doubts," however, he reserved a slim possibility that the NLRB's result might be justifiable on other grounds. Pet. App. 122a. Judge Silberman also concluded that it was "not obvious" whether the NLRB could justify its result, either on waiver or other grounds. Pet. App. 129a. Accordingly, those judges refused to enforce the NLRB's order, but voted to remand the case for reconsideration.

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[2] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively." 29 U.S.C. § 158(a)(5). Section 8(a)(1), 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer to interfere with rights guaranteed under section 7 of the NLRA, 29 U.S.C. § 157, which entitles employees to "bargain collectively" through their union.

[3] As Judge Edwards explained, the "waiver" theory reflects a "farcical misapplication of the law." Pet. App. 84a. In each of the waiver cases cited by the NLRB, an employer had sought to justify an otherwise impermissible action on the ground that the union had consented to it. Pet. App. 107a. Here, on the other hand, petitioner sought to implement its wage proposal not because the union already had agreed to it, but because petitioner, by engaging in good-faith negotiations to the point of impasse, had satisfied its statutory obligation to bargain collectively. Pet. App. 108a.

On the other hand, Judge Henderson would have reversed the NLRB outright. Citing the Tenth Circuit's decision in *Colorado-Ute*, which also had reversed outright an NLRB decision prohibiting employers from implementing discretionary merit pay proposals at impasse, Judge Henderson concluded that the NLRB's position in these cases was not only "unsupported" under the agency's own reasoning, but also legally "unsupportable" under any other reasoning as well. Pet. App. 134a. Judge Henderson stressed that "established law" entitles an employer at impasse "to implement its proposal" and "to grant merit increases" in wages. *Id.*

3. By a two-to-one vote, the NLRB reaffirmed its earlier decision on remand. The majority reasoned that allowing employers to implement discretionary wage proposals at impasse would be "destructive" of collective bargaining and would "disparage" the union "by showing, despite its resistance to this proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment." Pet. App. 63a-64a.

Member Cohen dissented. He explained that, once an employer "has satisfied its bargaining obligation (by bargaining to impasse)," the NLRA imposes "no statutory impediment to employer action." Pet. App. 69a. He further explained that, under this Court's decision in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), "collective bargaining can result in fixed terms and conditions of employment *or* discretion as to terms and conditions of employment." Pet. App. 69a (emphasis in original).

4. On review, the D.C. Circuit enforced the NLRB's decision. That court acknowledged this Court's seminal holdings that the NLRB may neither "sit in judgment upon the substantive terms of collective bargaining," *American National Insurance Co.*, 343 U.S. at 404, nor "functio[n] as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their

bargaining demands," *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960). Pet. App. 11a-13a, 16a. Nonetheless, the court of appeals concluded that this case was controlled by *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982), which it read as having authorized the NLRB to "den[y] the employer a particular economic tactic," based on its "appraisal of conditions that will affect the parties' bargaining power," in order to "preserv[e] the stability of the collective bargaining process." Pet. App. 13a.

Applying that reading of *Bonanno Linen*, the D.C. Circuit upheld the NLRB's ruling that an employer violates the duty to engage in collective bargaining when it implements a discretionary merit pay proposal at impasse. "[W]here the employer has advanced no substantive criteria for its merit pay proposal," the court reasoned, an employer's "economic leverage" from implementing at impasse "would go too far." Pet. App. 14a.

The judges below described this case as "difficult" and felt "obliged to admit that we are unsure ourselves as to the right answer." Pet. App. 24a. Accordingly, the court chose to "defer" to the views of the NLRB. *Id.*

REASONS FOR GRANTING THE WRIT

The NLRB's creation, and the D.C. Circuit's acceptance, of an exception to the implement-at-impasse rule for discretionary merit wage proposals raises fundamental questions that will affect the rights of all employers and unions under the NLRA. As Judge Edwards noted below, this case presents "a deceptively difficult question, reaching to the heart of labor law." Pet. App. 75a. For several reasons, this Court should decide that question.

I. THE DECISION BELOW CONFLICTS WITH THE TENTH CIRCUIT'S DECISION IN *COLORADO-UTE*

The decision below squarely conflicts with the Tenth Circuit's decision in *Colorado-Ute*. As the Solicitor General has acknowledged, *Colorado-Ute* presented the "iden-

tical" question at issue in this case. *See* Brief for the NLRB in Opposition at 8, *International Bhd. of Elec. Workers, Local No. 111 v. Colorado-Ute Elec. Ass'n, Inc.*, 504 U.S. 955 (1992) (No. 91-1284) (denying certiorari). The Solicitor General opposed *certiorari* in *Colorado-Ute* on the sole ground that this case was still pending in the D.C. Circuit. *See id.* Now that the D.C. Circuit has explicitly rejected the Tenth Circuit's position, review in this Court is no longer premature.

In *Colorado-Ute*, the Tenth Circuit squarely held that the NLRA permits employers to implement discretionary merit wage proposals at impasse. The Tenth Circuit applied the "general rule" that "an employer has the right upon impasse to implement its final offer with respect to a mandatory subject of bargaining such as wages." 939 F.2d at 1404.[4] To permit the opposite result for discretionary merit wage proposals, the court explained, "would conflict with the well-established proposition that the NLRB cannot exert its power to dictate the substantive terms of the collective bargaining agreement." *Id.* Thus, the Tenth Circuit refused to enforce the NLRB's order in *Colorado-Ute*, and it reversed that order outright and without remand. *See id.* at 1405.

The D.C. Circuit attempted to distinguish *Colorado-Ute* on the ground that, in that case, the NLRB had asserted only the "waiver" theory (Pet. App. 19a) aptly described by Judge Edwards as "farcical" (Pet. App. 84a). The Tenth Circuit, however, did not simply reject the "waiver" theory and then remand the case to permit consideration of possible alternative rationales. Instead, the Tenth Circuit held that the NLRB had "erred in construing the scope of the duty to bargain" under the NLRA, and it reversed the NLRB's decision *without* any remand

[4] Because wages are obviously a "mandatory" subject of bargaining (*i.e.*, a subject encompassed within the duty to bargain over "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d)), this case presents no question about other, so-called "permissive" subjects of bargaining. *See* Pet. App. 17a.

for further explanation. *See* 939 F.2d at 1405. As Judge Henderson recognized, the Tenth Circuit held that the position urged by the NLRB was not only "unsupported" as a matter of reasoned decisionmaking, but also "unsupportable" as a matter of law. Pet. App. 134a.

The D.C. Circuit also briefly suggested that the Tenth Circuit's decision "may be distinguishable" on the ground that the wage proposal at issue in *Colorado-Ute* involved a lesser degree of employer discretion. Pet. App. 19a. That purported distinction is wrong factually, for *Colorado-Ute* involved only a "general proposal that the employer be permitted to exercise discretion with respect to merit wage programs." 939 F.2d at 1401. Even the D.C. Circuit acknowledged that the *Colorado-Ute* proposal was "as substantively standardless" (to use the court's pejorative language) as the proposal at issue here. Pet. App. 19a n.7. Moreover, the purported distinction is also legally irrelevant, because the Tenth Circuit held that the restriction of an employer's right to implement any wage proposal at impasse, no matter how discretionary, would misconstrue "the scope of the duty to bargain" and would constitute regulation impermissibly based on "the substantive terms of the wage proposal." *See* 939 F.2d at 1405.

This Court should grant certiorari to resolve the circuit conflict between the decision below and the Tenth Circuit decision in *Colorado-Ute*.

II. THE DECISION BELOW MISCONSTRUES THE NLRA'S COLLECTIVE BARGAINING REQUIREMENT AND CONFLICTS WITH SEVERAL OF THIS COURT'S DECISIONS

Section 8(a)(5) of the NLRA imposes a duty "to bargain collectively," and section 8(d) of the NLRA expressly defines the scope of that duty. In pertinent part, section 8(d) provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees

> to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

29 U.S.C. § 158(d). Thus, the NLRA expressly provides that the duty "to bargain collectively" is simply a duty to "meet" at certain times and "confer in good faith" about certain subjects (including wages), and the NLRA expressly provides that this duty "does not compel" any agreement or "concession." The D.C. Circuit decision conflicts not only with the plain meaning of these statutory provisions, but also with several of this Court's decisions construing the provisions.

1. To begin with, the duty to engage in collective bargaining plainly affords no basis for restricting an employer's right to implement its final wage proposal *after* the employer has negotiated in good faith to impasse. "Impasse" is a term of art denoting either the "point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless" or, in other words, the point at which "the parties, despite the best of faith, are simply deadlocked." *Laborers Health Fund & Welfare Trust Fund*, 484 U.S. at 543 n.5 (internal quotations omitted). Once a lawful impasse has been reached, an employer by definition has satisfied its duty to "meet at reasonable times and confer in good faith," and implementation by definition cannot undermine—and thus can only improve—the otherwise "fruitless" possibility for further negotiations.[5] Accord-

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[5] As the court of appeals recognized (Pet. App. 16a), it is well-settled that employers or unions may insist to the point of impasse on any mandatory subject of bargaining. *See, e.g., NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

ingly, this Court has held that "impasse *and an accompanying implementation* of proposals constitute an integral part of the bargaining process," and that, "after impasse, labor law permits employers unilaterally to implement changes in preexisting conditions." *Brown v. Pro Football, Inc.*, 518 U.S. at 238 (emphasis added); *see, e.g., Laborers Health Fund & Welfare Trust Fund*, 484 U.S. at 543 n.5 ("If the parties were indeed at an impasse, then the employer's statutory duty to maintain the status quo during postcontract negotiations . . . would end.").[6] For decades, even the NLRB has acknowledged these principles: "[A]fter bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *aff'd sub nom. American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).[7]

In sum, this Court repeatedly has made clear that an employer, after bargaining in good faith to impasse, may implement a prior proposal regarding any mandatory subject of bargaining. The Court should grant certiorari be-

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[6] Prior to impasse, an employer cannot unilaterally change existing terms and conditions of employment. *See, e.g., Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1990); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). The rationale of this pre-impasse rule—" 'fostering a non-coercive atmosphere that is conducive to serious negotiations,' " *Laborers Health Fund & Welfare Trust Fund*, 484 U.S. at 544 n.6 (citation omitted)—is plainly inapplicable once impasse has rendered the negotiations "fruitless."

[7] An employer cannot implement a change beyond the scope of its prior proposals because, if it is willing to implement a term unilaterally, but is unwilling even to propose that same term to the union, then it obviously has not bargained in good faith. *See, e.g., Brown*, 518 U.S. at 238-39; *Katz*, 369 U.S. at 745. That principle is inapplicable in cases where, as here, the employer implements terms only after proposing them to the union and then lawfully bargaining to impasse.

cause the decision below conflicts with that settled principle.

2. Even outside the context of a bargaining impasse, this Court repeatedly has held that the NLRB cannot regulate the substantive content of collective bargaining proposals or agreements. In *American National Insurance Co.*, this Court held that, because section 8(d) leaves unregulated "the substantive terms governing wages, hours, and working conditions which are incorporated in an agreement" (343 U.S. at 402), the NLRB "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements" (*id.* at 404). The Court has repeated that holding on several occasions. *See, e.g., Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 153 (1976) ("state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB"); *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103 (1970) ("it was never intended that the Government would . . . step in, become a party to the negotiations and impose its own views of a desirable settlement"); *Insurance Agents*, 361 U.S. at 488 ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.").[8] Moreover, in *American National Insurance Co.*, the Court squarely held that this requirement of government neutrality also applies to the question whether a collective bargaining agreement should create rigid or flexible stand-

[8] Indeed, Congress enacted section 8(d) in 1947 precisely because it disapproved that the NLRB "had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.' " *American National Insurance Co.*, 343 U.S. at 404 (citation omitted); *see also H.K. Porter*, 397 U.S. at 105; *Insurance Agents*, 361 U.S. at 486.

ards for determining employment terms. The Court explained (343 U.S. at 409):

> Whether a contract should contain a clause fixing standards for such matters as work schedules or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

The D.C. Circuit's decision squarely conflicts with *American National Insurance Co.* and its progeny. The court of appeals acknowledged that its holding permits content-based regulation of collective bargaining proposals: although the court held that an employer cannot implement after impasse a *discretionary* merit pay proposal, it stressed that an employer *may* "implemen[t] a merit pay proposal post-impasse—so long as the proposal defines 'merit' with objective criteria." Pet. App. 18a. Such a legal preference for "fixing standards" over "flexible treatment" is exactly what this Court prohibited in *American National Insurance Co.* Moreover, although the D.C. Circuit correctly noted that *American National Insurance Co.* involved pre-impasse regulation (Pet. App. 17a-18a), that distinction undermines its holding even more: if the NLRB cannot regulate the content of proposals even before impasse, while collective bargaining is actively ongoing, then it obviously cannot regulate the content of proposals after a lawful impasse has been reached and the parties by definition have satisfied, at least temporarily, their collective bargaining obligations.

3. In *Insurance Agents,* this Court held that the NLRA not only permits the use of economic weapons during collective bargaining, but also makes such weapons "part and parcel of the collective bargaining process." *See* 361 U.S. at 495. Moreover, the Court further held that the only impermissible economic weapons are those "specifi-

cally outlawed by Congress." *Id.* at 498. The Court repeatedly has reaffirmed these principles. *See, e.g., Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 614 (1986) ("Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance"); *Machinists,* 427 U.S. at 147 ("self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons"); *NLRB v. Brown,* 380 U.S. 278, 283 (1965) (NLRA "does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands' " (citation omitted)). In particular, *Insurance Agents* makes it clear that the NLRB cannot seek "to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into the collective bargaining duty imposed by the Act." *Insurance Agents,* 361 U.S. at 497 (citations omitted). As the Court later confirmed, the NLRA "do[es] not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 317 (1965).

The D.C. Circuit's decision also conflicts with these principles. If the NLRA permits the use of economic weapons even "during the course of the good faith negotiations," *see Insurance Agents,* 361 U.S. at 490, then it obviously permits the use of such weapons after the parties have reached an impasse. And if, after impasse, the NLRA permits employers to use even the extreme economic weapon of locking out their employees, *see Brown v. Pro Football, Inc.,* 518 U.S. at 245; *American Ship Building Co.,* 380 U.S. at 308-09, then it obviously permits use of the much narrower weapon, which Congress has never "specifically" outlawed, of implementing a prior wage proposal. The D.C. Circuit's contrary assertion—

allowing employers to implement discretionary wage proposals at impasse might create "economic leverage" that "would go too far" (Pet. App. 14a)—is simply irreconcilable with this Court's repeated holdings that the NLRB cannot lawfully "deny weapons to one party or the other because of its assessment of that party's bargaining power." *American Ship Building Co.*, 380 U.S. at 317.

4. The D.C. Circuit erred in concluding that, notwithstanding these various decisions, *Bonanno Linen* permits the NLRB to create exceptions to the implement-at-impasse doctrine. In *Bonanno Linen*, this Court held that an employer at impasse cannot unilaterally withdraw from a multiemployer bargaining unit. *See* 454 U.S. at 411-12. Despite that limited holding, the court of appeals read *Bonanno Linen* as having authorized the NLRB to prohibit the use during collective bargaining of "particular economic tactic[s]" that it thought "would go too far" in creating "economic leverage" for one party or the other. Pet. App. 13a-14a. *Bonanno Linen*, however, cannot be read that broadly.

Bonanno Linen addressed the power of the NLRB to regulate only a single aspect of the process of bargaining. The NLRA expressly authorizes the NLRB to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). Moreover, both the employer and the union must consent to the creation of a multiemployer unit. *See Bonanno Linen*, 454 U.S. at 412; I P. Hardin, *The Developing Labor Law* 511 (3d ed. 1992). It is hardly surprising, once the parties have consented to create a multiemployer bargaining unit, once the NLRB has approved that unit, and once the parties have begun to bargain within the context of that unit, that the NLRB should have at least some discretion to govern when the employer may then withdraw from the unit.[9]

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[9] *Bonanno Linen* appears to hold nothing more than that an employer, in order to withdraw from a multiemployer bargaining unit after negotiations have begun, must reserve that power expressly. As Justice Stevens, who provided the fifth vote for the *Bonanno*

Nothing in *Bonanno Linen* undercuts the controlling precedents in this case. *Bonanno Linen* does not address the implement-at-impasse doctrine recognized without qualification from *Taft Broadcasting Co.* (163 N.L.R.B. at 478) through *Brown v. Pro Football* (518 U.S. at 238). *Bonanno Linen* also does not address the principle, consistently recognized for decades, that the NLRB "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *American National Insurance Co.*, 343 U.S. at 404. And far from undermining the principle that the NLRA generally permits the use of economic weapons during collective bargaining, *Bonanno Linen* expressly reaffirmed that the NLRA neither " 'constitute[s] the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands,' " 454 U.S. at 418 (quoting *Insurance Agents*, 361 U.S. at 497) nor "give[s] 'the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power,' " 454 U.S. at 418 (quoting *American Ship Building Co.*, 380 U.S. at 317).

For all of these reasons, *Bonanno Linen* provides no support to the D.C. Circuit's holding.[10]

Linen majority, explained: "The Court's holding does not preclude an employer from explicitly conditioning its participation in group bargaining on any special terms of its own design. Presumably, an employer could refuse to participate in multiemployer bargaining unless the union accepted the employer's right to withdraw from the bargaining unit should an impasse develop." 454 U.S. at 420 (concurring opinion).

[10] The D.C. Circuit also erred in affording deference to the NLRB's interpretation of the NLRA. As explained above, this Court repeatedly has held that employers may implement after impasse, that the NLRB cannot regulate based on the content of collective bargaining proposals, and that the NLRB must permit

III. THE DECISION BELOW IMPLICATES IMPORTANT ISSUES AND EFFECTS A MAJOR CHANGE IN THE BALANCE OF LABOR RELATIONS

A. The D.C. Circuit's Decision Would Lead to a Shift in the NLRA's Careful Balance of Bargaining Power

In today's workplace, with its national and international competitive pressures, employers increasingly seek to include merit pay schemes in collective bargaining agreements in order to reward their most productive employees. The decision of the D.C. Circuit not only makes it impossible to implement certain kinds of merit pay plans at impasse, but also makes it difficult for an employer to determine which plans may pass NLRB muster and which may not.

The NLRA carefully balances the economic weapons that parties may use in negotiating collective bargaining agreements. A union retains the right to engage in strikes and other "concerted activities" over terms and conditions of employment. 29 U.S.C. § 157. The theory behind the right to strike is that this right, and the threat of its exercise, is a potent "economic weapon which in great measure implements and supports the principles of the collective

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the use of economic weapons not specifically prohibited by statute. As the D.C. Circuit itself acknowledged (Pet. App. 9a), the NLRB is absolutely bound by these holdings, even assuming that the text of section 8(d) were otherwise ambiguous. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Moreover, even assuming that the NLRB's construction of the NLRA were legally permissible, the agency has failed to justify that construction through reasoned decisionmaking. The NLRB reasoned that implementation of discretionary wage proposals would "disparage" unions by showing their "incapacity" to set desired terms and conditions of employment. Pet. App. 63a-64a. Such an alleged "incapacity," however, would exist whenever an employer implements after impasse, and thus affords no basis to target discretionary wage proposals for disfavored legal treatment.

bargaining system." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963). An employer's right to implement its last proposal at impasse is likewise an economic weapon, which the employer may use, or threaten to use, to move the union toward settlement. *See Brown v. Pro Football, Inc.*, 518 U.S. at 238.

This Court has recognized that deadlocks in bargaining are often broken by the application of economic force:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force. Furthermore, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process. Hence, there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways.

Bonanno Linen, 454 U.S. at 412 (internal quotations omitted); *see also Insurance Agents*, 361 U.S. at 489 (describing "economic force" as " 'a prime motive power for agreements in free collective bargaining' ") (citation omitted). Therefore, "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining," even if the economic tool used is unconventional or unpopular. *Id.* at 495.

These economic weapons—the right to implement at impasse and the right to strike—are counterpoised. As this Court has explained, "Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance between the uncontrolled power of management and labor to further their respective interests." *Golden State Transit Corp.*, 475 U.S. at 614 (internal quotation omitted). The *Colorado-Ute* court noted this balance of power when it refused to limit the employer's right to implement wage

terms at impasse. *See* 939 F.2d at 1404-05 & n.8; *see also* Pet. App. 69a (Cohen, dissenting) ("the freedom to make postimpasse changes is a legal weapon that can be used in bargaining, just as a strike and lockout can be used as weapons").

The court below allowed the NLRB to place its thumb on the scales of bargaining when employers propose certain merit pay plans. By removing the employer's economic weapon while keeping the union's in place, the NLRB removes a large incentive for a union to agree to any merit pay plan. Thus, by removing this economic weapon, the NLRB is "in a position to exercise considerable influence upon the substantive terms on which the parties contract." *Insurance Agents*, 361 U.S. at 490. And the court below did not dispute this, admitting that "an employer in this situation is somewhat 'stuck' on its wage proposal" (Pet. App. 18a) and that there is "a good deal of force" in the argument that the NLRB's decision allows it to indirectly regulate the terms of bargaining (Pet. App. 17a).

B. The D.C. Circuit Has Changed the Default Rule to the Parties' Mutual Disadvantage

Because the effect of the D.C. Circuit's decision is to shift the default rule for bargaining, it has tremendous practical economic effect. Under this decision, parties now know that, when an impasse is created in bargaining for certain merit pay plans, the old collective bargaining agreement will remain in place and the status quo wages will remain frozen. Because the setting of this default rule is important to both employers and employees, this Court should decide this issue.

Indeed, the D.C. Circuit's decision on this issue may ultimately work to both sides' mutual disadvantage. In many collective bargaining circumstances, expired wage agreements were negotiated years earlier in different economic circumstances. If, despite their best efforts to bar-

gain, employers are locked into an unprofitable status quo, then both employers and unions will suffer the consequences. Murphy, *Impasse And The Duty To Bargain In Good Faith*, 39 U. Pitt. L. Rev. 1, 24-25 (1977).

C. The NLRB's Novel Theory Could Be Argued to Preclude Implementation of Any Number of Proposals at Impasse

The NLRB's theory may not be limited to the specific merit pay plans in issue in this case, as there are potentially a vast number of other proposals that could be argued to "disparage" a union, and thus to "de-collectivize" bargaining (Pet. App. 13a-16a). Under the logic of the decision below, the NLRB might be emboldened to find that an employer has effectively "decollectivized" bargaining by various actions that a union may argue shows its "incapacity to act as the employees' representative." Pet. App. 15a (quoting Pet. App. 64a). This possibility has already been raised, in dicta, by an administrative law judge. *See International Paper Co.*, 319 N.L.R.B. 1253, 1353 & n.157 (1995), *enforcement denied*, 115 F.3d 1045 (D.C. Cir. 1997). Unions predictably will seek to extend the court of appeals' open-ended "de-collectivization" theory far beyond the specific context of wages. *See, e.g.*, J. Hunter, *Recent and Pending Cases at the National Labor Relations Board*, Proceedings of New York University 43rd Annual Conference on Labor § 1.5 (1990). Indeed, at least one union attorney already has argued that the decision below applies to a wide range of subjects, including layoffs, promotions, and employee benefits. *Court Decision Restricts Employer 'Discretion'*, Communication Workers of America Sector News, PP&MW, at 6B (Feb. 1998). Before the NLRB extends the decision below to create other exceptions to the implement-at-impasse rule, this Court should review the circuit split on the question of whether the NLRB is entitled to create such an exception in the first instance.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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May 1998

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